(16,825.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 262.

GILMORE G. SCRANTON, PLAINTIFF IN ERROR,

vs.

EBEN S. WHEELER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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1 *Declaration.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

STATE OF MICHIGAN, } ss:
County of Chippewa, }

Gilmore G. Scranton, plaintiff herein, by Harlow P. Davock, his attorney, comes and files this his declaration as commencement of suit, and complains of Eben S. Wheeler, defendant herein.

For that, whereas, the said plaintiff, on the twentieth day of February, in the year one thousand eight hundred and ninety-one, was the owner in fee and possessed of the following real estate and premises, situate in the city of Sault Ste. Marie, county of Chippewa, in said State of Michigan, and being known and designated as an undivided one-half interest, or portion of, in and to private land claim number three (3), Whelpley's survey, in the village of Sault Ste. Marie, Michigan, which said premises the said defendant claims in fee.

And he, the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit: on the twenty-first day of February, in said last-mentioned year, entered into said premises, and unlawfully withholds from said plaintiff the possession thereof, to the damage of said plaintiff thirty-five thousand dollars, and therefore he brings suit, etc.

HARLOW P. DAVOCK,
Attorney for Plaintiff, Detroit, Mich.

BRENNAN & DONNELLY, *Of Counsel.*

2 *Plea.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

GILMORE G. SCRANTON, Plaintiff,
vs.
EBEN S. WHEELER, Defendant. } Ejectment.

And now comes said defendant, by Lewis G. Palmer, his attorney, and demands a trial of the matters set forth in the plaintiff's declaration herein.

Dated June 2, 1891.

LEWIS G. PALMER,
Defendant's Attorney.

3 *Stipulation Amending Declaration.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

GILMORE G. SCRANTON, Plaintiff,
vs.
EBEN S. WHEELER, Defendant.

It is hereby stipulated that the description in the original declaration in this cause be amended as follows: "Situated in the city of Sault Ste. Marie, in said county of Chippewa, State of Michigan, and being known and designated as an undivided one-half interest or portion of, in and to private land claim number three (3), Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof, which said premises the plaintiff claims in fee." Said amended declaration to stand as of the time of filing the original declaration in said cause. It is further stipulated that the plea to the original declaration now on file stand as the plead to said amended declaration, and though filed as of the date of the original plea.

HARLOW P. DAVOCK,
Attorney for Plaintiff.

L. G. PALMER,
Attorney for Defendant.

4 *Amended Declaration.*

STATE OF MICHIGAN, *County of Chippewa,* } *ss:*

The Circuit Court for the County of Chippewa.

Gilmore G. Scranton, plaintiff in this suit, by Harlow P. Davock, his attorney, comes into court, according to the form of the statute in such case made and provided, and filing this, his declaration as commencement of suit, complains of Eben S. Wheeler, defendant in this suit:

For that, whereas, the said plaintiff heretofore, to wit: on the twentieth day of February, in the year one thousand eight hundred and ninety-one, was the owner in fee and possessed of the following real estate and premises, with the appurtenances, situated in the city of Sault Ste. Marie, in said county of Chippewa, State of Michigan, and being known and designated as an undivided one-half interest, or portion of, in and to private land claim number three, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's

river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto, and being a part thereof, which said premises the said plaintiff claims in fee; and he, the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit: on the twenty-first day of February, in the year one thousand eight hundred and ninety-one, entered into the said premises and ejected the said plaintiff therefrom, and, the said plaintiff being lawfully entitled to the possession of said premises, the said defendant unlawfully withholds from said plaintiff the possession thereof, to the damage of said plaintiff of thirty-five thousand dollars, and, therefore, he brings suit, etc.

HARLOW P. DAVOCK,
Attorney for Plaintiff.

BRENNAN & DONNELLY, *Of Counsel.*

5 *Verdict and Judgment.*

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER. } Ejectment.

In this cause, the parties being in court by their respective attorneys, ready for trial, thereupon came a jury of twelve good and lawful men, to wit: Robert G. Crawford, Thomas King, John Cox, John McDermid, Thomas Melvin, David Dibbs, Fred W. Wilson, Daniel Young, N. L. Field, John C. Calder, J. H. Bange and Walter Dennis, who, being duly chosen, tried and sworn well and truly to try the issue between the parties, after hearing the proofs and allegations of the parties, and the arguments of counsel, by order of the court, without leaving their seats, say upon their oath that the said Eben S. Wheeler is not guilty of unlawfully withholding from the said Gilmore G. Scranton the premises described in his declaration filed in this cause, in manner and form as the said Gilmore G. Scranton hath in his declaration in this cause alleged.

Therefore, on motion of John Power, attorney for the said Eben S. Wheeler, it is ordered and adjudged by the court now here, that the said Gilmore G. Scranton take nothing by his suit, and that the said Eben S. Wheeler do go hereof without *delay*, and that the said Eben S. Wheeler do recover against the said Gilmore G. Scranton his costs and charges by him about his defense in this
6 — above expended to be taxed, and that the said Eben S. Wheeler have execution therefor.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER. } Ejectment.

In this cause, on motion of Harlow P. Davock, attorney for the plaintiff, it is ordered and considered by the court now here, that said Gilmore G. Scranton have ninety days in which to move for a

new trial, or in which to prepare and present to this court for settlement a bill of exceptions; and that on filing a good and sufficient bond within twenty days, pursuant to the provision of the statute in such case made and provided, that all proceedings in the meantime be stayed, except taxation of costs.

J. H. STEERE,
Circuit Judge.

STATE OF MICHIGAN, } ss:
County of Chippewa, }

I, Jean Webster, deputy clerk of the circuit court of said county, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of judgment and verdict with the original record and files thereof now remaining in my office, and have found the same to be a correct transcript therefrom, and the whole of such original record and files.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Sault Ste. Marie, this 10th day of February, A. D. 1897.

[SEAL.]

JEAN WEBSTER,
Deputy County Clerk.

7 *Bill of Exceptions.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Chippewa.

GILMORE G. SCRANTON }
vs.
EBEN S. WHEELER. }

At a session of the circuit court for the county of Chippewa, held in the circuit court rooms, in the city of Sault Ste. Marie, on the 8th day of September, 1896.

Present: The Hon. Joseph H. Steere, circuit judge.

The above cause, being at issue, came on to be tried before the said circuit judge with a jury duly impaneled to try the same, and the plaintiff, to maintain the issue on his part, showed:

That the plaintiff was the owner in fee of the undivided half of private claim number three, in the village of Sault Ste. Marie, Chippewa county, Michigan, in said western district and northern division, according to the survey or plat of said village by Thomas Whelpley, made pursuant to the provisions of an act of Congress approved September 26th, 1850, and entitled, "An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan." A copy, said Whelpley survey, in part, is here annexed and marked Exhibit "9"—line of new pier being since added.

8 The land in question was confirmed under the provisions of that act to the heirs of Franklin Newcomb and one Peck jointly, and plaintiff derived title by mesne conveyances from the

heirs of Franklin Newcomb, by which he became the owner of the undivided half above referred to, prior to the construction of the pier by the United States Government, hereinafter stated, and plaintiff offered evidence tending to show that the undivided half of said land was worth the sum of six thousand dollars and upwards, which was disputed by the defense.

That the United States Government, through its officers, constructed what is called the new South pier, at the upper end of the Saint Mary's Falls ship canal, across the front of said private claim three, and within the boundaries of the riparian ownership of the plaintiff, as projected from the land towards the middle thread of the stream, as shown by the map or plat attached to and made a part of the deposition of Alfred Noble, which is hereinafter made a portion of this bill of exceptions.

The construction of the pier was commenced in 1877, and completed in 1881, and that the effect of the construction of the pier in question was to entirely exclude the plaintiff from all access from his land within the lateral lines of his riparian ownership, projected as aforesaid, to the navigable water or to the channel of the river that was navigable, as shown by a plat or map thereof hereto attached and marked Exhibit "1." That on both sides of the space included within such projected lines of plaintiff's riparian ownership, and between the pier and the bank of the river, the water was only five feet in depth, so that by the construction of the pier and of the maintenance thereof, plaintiff is prevented from reaching navigable water of greater depth than five feet. That plaintiff attempted to land cargo on said pier, and thus convey it to his
9 lot in question, but was prevented from doing so and driven off by the defendant, who claimed the exclusive right thereto for the United States.

That the defendant Wheeler was the superintendent of the canal, including this pier, employed by the United States, and in possession of it for and on behalf of the United States Government; that he was in such possession under such authority, and under such claim, prior to and at the time of the commencement of this suit, and continued so up to the time of the trial; that the said canal was originally constructed by the State of Michigan, through United States lands, and the location thereof and the right of way therefor were provided by an act of Congress approved August 26th, 1852, entitled, "An act granting the State of Michigan the right of way, and the donation of public land for the construction of a ship canal around the falls of Saint Mary's, in said State;" and Exhibit "2" hereto attached is the plat of the survey of the line or route of said canal referred to in sections 1 and 6 of said act.

That Exhibit "3" hereto attached is a copy of the patent of said lands issued by the Government; that the confirmation of the claim of the patentees, under the act of September 26th, 1850, was made by the Commissioner of the Land Office, as provided therein, in 1855.

That Exhibits "4" and "5," hereto attached, are plats or maps showing said private claim three, and the lateral boundary lines, as

projected as aforesaid, of plaintiff's riparian ownership, and the location of the new pier, and also of the piers of the canal, as originally constructed, together with the boundaries of the canal right of way granted under the act of August 26th, 1852. That the possession of the defendant Wheeler for the United States was exclusive and adverse to the plaintiff.

The canal, as originally constructed, was begun in 1853 and completed in 1855, and the original pier, as built, extended across
10 a portion of the front of private claim three, taking a turn to the northward into deep water, leaving, however, from three to four hundred feet of a gap, through which access to navigable water could be had from plaintiff's land; that the new pier does not follow the lines of the deep water; that the depth of the water on the land where the new South pier was built was about an average of five fet, and the whole space between where the old pier stood and the new pier was constructed had to be removed by excavation.

The rapids or falls began east of where plaintiff's eastern lateral line would strike deep water, as plaintiff claimed under the law; that the river proper in front of plaintiff's land and across his riparian front was naturally deep enough for navigation, and plaintiff's eastern lateral line, projected, reached to such deep water; that the pier or improvement in question was a part of the canal, and within the piers and between the piers as they now exist was an artificial channel, made in extension of and as a part of the canal, which was also an artificial channel, constructed through the land around the falls; that the survey and plat marked Exhibit "2" is the plat of the route of the old canal, as approved by the Secretary of War and finally selected by him.

At the request of the court the field-notes of Whelpley's survey of private claim three were introduced in evidence, and are hereto attached, marked Exhibit "6." That no map or plat showing any change in the route of the canal has been made or filed in any of the departments, with reference to the change from the old plan or route to the new one, except the plans submitted by the United States engineers to the Secretary of War, as hereinafter stated.

That before the construction of said new pier, the same
11 was recommended by the corps of engineers to the Secretary of War, with an accompanying map, a copy of which is annexed, marked Exhibit "A," and the specific work was by him approved, and said pier constructed in accordance therewith; said recommendation and approval were in accordance with the usual way of carrying on public work for the United States Government.

In 1881 the State of Michigan transferred all rights to the canal to the United States. That the South pier, as it now stands, and where it crosses in front of plaintiff's land, is more than two hundred feet from the center line of the right of way granted by the act of August 26th, 1852, as fixed by Exhibit "2."

Provided under the terms of said act, said center line after it crosses the meander line of the river was to be drawn on a curve

line conforming to the curve of the piers, as shown by the map of location approved by Secretary of War, 1853.

Counsel for defendant argued that the center line of the grant was not definitely located by the map, and established beyond the military reservation and under the waters of the river, and arguing further that said pier was constructed on a line parallel with the center line of the grant, if said center line extended in a straight line westward from the meander line of the river and parallel with said South pier, as constructed.

The court stated in its impression that the map did fix the old route of the canal, and they were bound by it unless the route was afterwards changed.

That said Saint Mary's river forms a part of the boundary line between the United States and Canada, and, where navigable, with the Great Lakes, forms a highway for interstate and international commerce. That at the falls near the point in question the said river was not navigable owing to the falls, and said canal was
12 built around the same to connect the navigable parts of the river above and below, and is used in connection therewith for the purpose of interstate and international commerce.

The plaintiff then offered in evidence the deposition of ALFRED NOBLE, with the exhibit thereto attached, which is deemed especially important by counsel for plaintiff, and at their request is here inserted in full, as follows:

Intr. 1. What is your name, age, residence and occupation?

Ans. My name is Alfred Noble; I am 48 years of age and reside in Memphis, Tennessee. By occupation I am a civil engineer.

Intr. 3. Your present work is what?

Ans. I am resident engineer of the Memphis bridge.

Intr. 4. State if at any time you were acting in a professional character for the Government?

Ans. Yes, sir; been employed as such from May, 1868, until 1892.

Intr. 5. What public work were you engaged on during the year 1887?

Ans. Saint Mary's Falls canal.

Intr. 6. Between what points does that canal extend?

Ans. It extends in the Saint Mary's river at Sault Ste. Marie.

Intr. 7. What is the nature of that work?

Ans. It is a ship canal. It is for the passage of vessels from Lake Huron to Lake Superior.

Intr. 8. What work in connection with that canal, or waterway, extends beyond the water's edge westerly?

Ans. There is a pier extending into Saint Mary's river at the western entrance of the canal on the south side.

Intr. 9. What on the north?

Ans. A shorter pier.

Intr. 10. Now, with special reference to what you designate
13 as the pier on the south side, I show you, Mr. Noble, a blue print or map by Mr. J. B. Davis, of Ann Arbor, Michigan;

now, will you state whether that map is, as you understand it, a strictly substantial illustration of that pier, its location, and that portion of the canal immediately adjacent to it?

Ans. It is substantially correct.

Intr. 11. Do you know Mr. Davis?

Ans. Yes, sir.

Intr. 12. What is his profession?

Ans. A civil engineer by profession, and assistant in the University of Michigan. I have known him since 1867.

Intr. 13. Under whose supervision was that South pier built?

Ans. It was built under my own supervision, as assistant engineer in charge.

Intr. 14. Who was the chief engineer?

Ans. Gen. Godfrey Weitzel.

Intr. 15. I call your attention to some lines, dotted lines, and other lines to be found between what is designated on the map as the North pier, 1891, and the South pier, 1891. What do you say with reference to these lines and paragraphs marked "South pier as built and North pier as built"?

Ans. So far as I can judge, they represent correctly the location of the North and South piers in 1870.

Intr. 16. That is, you mean the piers that were constructed when the canal was first built?

Ans. Not necessarily. The map represents the South pier when built, or when the canal was first constructed, and the North pier was afterwards extended.

Intr. 17. Does the map, so far as those two piers are concerned, represent substantially the piers as they were when you went there in charge of the work?

14 Ans. I should say, as to the North pier, it was nearly or quite to the extent shown on this map.

Intr. 18. How as to the South pier?

Ans. The South pier, marked on the map "the South pier as built," represented the work at that time, or the condition and location of the pier when I went there, as nearly as I can tell from the map.

Intr. 19. What was the general nature of the improvements? What under your supervision in reference to the canal?

Ans. The construction of the new lock and the straightening of the south bank of the canal at the west end.

Intr. 20. And was the cut, or channel, a part of the lock proper, and that was deepened. Was it widened?

Ans. Yes, sir, it was widened nearly the whole length from the upper end of the lock to the head of the canal. I mean the west end of the lock.

Intr. 21. What became of the old pier?

Ans. The North pier remained without change, and the South pier was removed, and the upper pier made straight.

Intr. 22. That is, the south side of the west end of the canal was made straight?

Ans. Yes, sir.

Intr. 23. By whom—or, I should have said, how?

Ans. Partially by excavating the lock within the cofferdam, and the building of the piers.

Intr. 24. Will you explain in your own way just the character and the extent of that work so far as the straightening of the south side, and the construction of the South pier, and the dredging?

Ans. The depth of the water along the line afterwards occupied by the South pier began from nothing at the shore line to
15 about sixteen feet at the extreme west end, and for the greater part of the distance was not over five or six feet deep.

Intr. 25. What was the nature of the bottom?

Ans. It was sand, so far as we could see; from an inspection of the bottom we found a large number of boulders, and at the east end of the work found a bed of rocks.

Intr. 26. How far to the northward of the South pier, as straightened out, did that shoal water extend, five or six feet?

Ans. The limit of the depth of five feet of water, as nearly as I can recollect, was very nearly a straight line drawn from the southwest corner of the old South pier to a point on the north face of the new South pier about two hundred feet east from the west end of the pier.

Intr. 27. And so, between that line so drawn and where the new South pier, so called, was located, shoal water, a depth of about five feet?

Ans. Yes, sir.

Intr. 28. Coming south of that pier, between the South pier and the shore line, what was the nature of the bottom, if you remember, and the depth of the water?

Ans. The depth gradually diminished towards the shore and the bottom was generally sandy, with perhaps some boulders at the southern limit.

Intr. 29. How did you build that South pier? What work, if anything, did you have to do to prepare for the construction of it?

Ans. The side of the pier was first dredged to a depth of about sixteen feet, the full width, or a little more than the full width, of the proposed pier.

Intr. 30. What is the length of the pier from the point where it leaves the water's edge?

Ans. It is about eighteen hundred feet from the water's edge, before the work was commenced.

16 Intr. 31. How far does it extend beyond the extreme western point of the old pier—the old South pier, so called?

Ans. It appears to be about twelve hundred feet.

Intr. 32. What was the depth of the water between the old South pier and the line of the new pier?

Ans. It was about five feet at or opposite the outer end of the old South pier, and diminished.

Intr. 33. At what point, with reference to the shore line, does the new South pier begin to diverge from the course or line of the old pier?

Ans. It diverges from the original south bank of the canal, about four hundred and fifty feet east of the original shore line.

Intr. 34. That is, the south wall of the canal, of which the South pier is an extension, begins to diverge from the old wall of the canal about four hundred and fifty feet from the shore line?

Ans. Yes, sir.

Intr. 35. What was the depth of the water in the old channel; that is, the old channel at the time that you began the construction of the new one?

Ans. About twelve feet.

Intr. 36. Was that the depth of the water between the old piers?

Ans. Substantially so. The water was a little deeper along the outer end of the North pier.

Intr. 37. Is it not a fact, Mr. Noble, that the old piers extended or were constructed out to the channel where the natural depth of the water was about twelve feet?

Ans. I don't know as to that; my recollection is different from that.

Intr. 38. Now, from looking at this map, and assuming the
17 drawing made there as to the old pier to be substantially correct, what was the general direction of those piers?

Ans. A little northwest.

Intr. 39. Assuming the same, what is the general direction of the South pier as constructed under your supervision?

Ans. A little south of west.

Intr. 40. What do you say as to that being or not being a material change in the direction of the canal at that point?

Ans. It was a material change at the west end of the canal.

Intr. 41. Now, assuming again Mr. Davis' drawing to be correct, what is the distance between the western end of the South pier, as built, or the old South pier or the point directly opposite of the new South pier?

Ans. Three hundred feet.

Intr. 42. What is the distance from the western end of the old South pier, as built, and the line of the old North pier?

Ans. Two hundred feet.

Intr. 43. When did you begin the construction of this new South pier?

Ans. We began the construction during the year ending June 30th, 1878.

Intr. 44. What was the first work done?

Ans. Dredging for the site of the pier.

Intr. 45. Where was the first dredging done?

Ans. I couldn't say at this time, exactly.

Intr. 46. Is there anything in any of your records to indicate that?

Ans. No, sir, not for the pier.

Intr. 47. What portion of the pier was first put in?

Ans. That I don't remember definitely.

18 Intr. 48. By looking at one of your reports at the close of the year, June 30th, 1878, I find that one thousand and

seventy feet of crib-work had been placed, and the west end was built two hundred and fifty feet east of the west end of the work, as finally completed. Now, how near did they come to being on a line with the west end of the old South pier?

Ans. The east end of that work was about one hundred and fifty feet east of the old South pier, east of the west end of the old South pier.

Intr. 49. How long was it from the time that you began the construction in the manner indicated until the pier was constructed and the superstructure and all of this dredging north of the South pier completed?

Ans. If I remember correctly, the work was entirely finished in 1881.

Intr. 50. By what authority were you acting as assistant engineer in charge of the improvement at Sault Ste. Marie?

Ans. Gen. Godfrey Weitzel's. He was of the corps of the United States Army.

Intr. 51. For whom was this work being done, and under whose authority was it being constructed?

Ans. Gen. Weitzel was a member of the corps of engineers, and was acting under the orders of the United States Government.

Intr. 52. And the improvement of the canal and this work that you have been testifying about was for the Federal Government?

Ans. It was, to my knowledge.

Intr. 53. Did you hold any official position in connection with the operation of the canal?

Ans. I was general superintendent of the canal.

Intr. 54. Until what time?

Ans. Until 1882. From the time that the canal was trans-
19 ferred by the State of Michigan to the United States, I think in 1881, until August, 1882.

Intr. 55. You speak of the canal being transferred by Michigan to the Government. The State had nothing to do with this work that you know of?

Ans. Nothing whatever.

Intr. 56. I will call your attention again to the map and to a line drawn from the shore in a northwesterly direction and designated as "Riparian boundary to twelve curve, as per Michigan reports." State how far that line is from the western end of the old South pier, as built, where it would intersect that pier if extended, or if the pier were extended.

Ans. That question is a little difficult to answer.

Intr. 57. Suppose the pier to be extended in a straight line from, or suppose it were extended in the same direction as the new South pier?

Ans. Assuming the map to be correct, the distance would be about two hundred and eighty feet.

Intr. 58. Have you ever had occasion to look at the map filed in the office of the War Department, and also the Land Commissioner's office, showing the survey?

Ans. Yes, sir.

Intr. 59. How long since you saw it?

Ans. At least ten years.

Intr. 60. Do you remember whether there was any substantial variation between the plat as laid down on that map and the actual construction of the old piers?

Ans. I do not.

Intr. 61. You never looked into that?

Ans. No, sir; I never looked into that.

Intr. 62. How did you come to go on this land to build that pier?

Ans. I don't remember now that the question of private
20 ownership ever occurred to us. I will say that I don't remember that it ever occurred to us before we began to work. I think Mr. M. W. Scranton remarked about it, or referred to it.

Intr. 63. Who is he?

Ans. The father of the plaintiff in this case.

Intr. 64. So far as you had anything to do with it, did you ever acquire any right from Mr. Scranton, or any one owning that land, to build the pier for the Government?

Ans. Never did.

Intr. 65. Do you remember how long after they began the work of extending that South pier out when Mr. Scranton mentioned the difficulty?

Ans. I do not.

Intr. 66. Looking at the map again, Mr. Noble, I will call your attention to a line marked "Whelpley," 1854 and 1855. Now, assuming that to be substantially correct, how far from that shore line is the easterly end of the pier?

Ans. The distance from the intersection of the South pier with the line marked "present (1891) shore line" to the point marked "new South pier" intersects the old south bank of the canal, or the shore, is about five hundred feet, assuming the map to be correct.

Intr. 67. How permanent is that pier?

Ans. A portion of the timber is above low water and will have to be rebuilt in five, six, or eight years.

Intr. 68. How effectually does it shut off approach from that part of the shore marked "southwest part, private claim No. 3," within the boundaries as laid down on the map, to the channel or deep water?

Ans. It crosses the land described.

Intr. 69. Completely?

Ans. Yes, sir.

Intr. 70. So that there is no way of obtaining access to private claim No. 3, that I have mentioned within the riparian deep
21 water as laid down on the map, except by crossing the pier?

Ans. No, sir.

Intr. 71. The space between the South pier, as originally built, and the South pier as constructed under your supervision in 1881, was used for what purpose?

Ans. It has been dredged and excavated to the depth of sixteen feet and forms part of the canal channel.

Intr. 72. And was in the possession of the United States when you were there?

Ans. Yes, sir.

Intr. 73. Referring to the question of excavating, you used that term to distinguish from the term "dredging and rock-work"?

Ans. Yes, sir.

Intr. 74. Will you explain the method adopted and followed in that excavation between the riparian boundaries there? I think one of your records shows that.

Ans. I don't know whether it shows the cofferdam or not. I am pretty certain that within the area described the material was all removed by dredging between the riparian lines.

Intr. 75. What portion of the work was done by rock excavation, rendered possible by the building of the cofferdam?

Ans. It would be approximately the area, or over the area, bounded by the south line of the new South pier to the north line of the old South pier and the eastern boundary of the claim to which you have referred, or claim No. 3.

Intr. 76. What was the necessity for building a cofferdam? Wasn't this substantial land that was taken away or excavated there?

Ans. The building of the cofferdam was necessary to
22 remove the rock and shut the water out so that the men could work in the excavation.

Intr. 77. Within that area excavated in the manner that you have just spoken of, what portion was under water?

Ans. I couldn't give the proportion with any degree of accuracy. Some portions were covered with water and other portions were above water.

Intr. 78. Is it not true, also, that that pier constructed and called "South pier" and a portion of that excavation was not under water? Didn't you extend the foundation for the pier into the land somewhat?

Ans. Yes, sir.

Intr. 79. Were you familiar with the general course of the stream there?

Ans. Yes, sir; I was.

Intr. 80. About what was the general course of the stream there?

Ans. It was nearly southwest and northeast.

Intr. 81. Now, looking at the map again, and at a line designated as the "twelve-foot curve, U. S. chart," commencing at the outer edge of the map and running to the west end of the new South pier, and taking that along then to the southern, and again crossing the South pier in a northern direction, what do you say as to that portion of the line that extends between the points where it crosses the South pier to the point where it crosses the North pier as conforming substantially to the general course of the stream there?

Counsel for defendant objects to the question on the ground that it has not been shown that any survey has been made that deter-

mines the correctness of the map in question here, or that the trend of the stream in question has been ascertained in survey or measurement, and that the testimony proposed for that reason is incompetent.

23 Ans. I can say in a general way that the course is pretty close to the direction of the stream.

Cross-examination.

By LEWIS G. PALMER, counsel for defendant:

Intr. 1. You have no particular knowledge, have you, of the direct authority or commission under which Gen. Weitzel acted on that work, except in a general way that he represented the Government?

Ans. I have seen the correspondence of Gen. Weitzel.

Intr. 2. And you were acting under him?

Ans. Yes, sir.

Intr. 3. Subject to his orders and no other orders?

Ans. Under his orders, and no other orders.

Intr. 4. Now, had you any other knowledge except that the father of the plaintiff in this case may have mentioned the matter to you, that you were interfering with any private claim in building this pier, or interfering with riparian rights?

Ans. Not to the best of my recollection.

Intr. 5. What effort, if any, was ever made by the plaintiff, or any one on his behalf, to stop the progress of this work, from the time that it began until it was completed?

Objected to by counsel for the plaintiff as incompetent.

Ans. I know of no effort of the kind.

Intr. 6. Are you acquainted with the plaintiff in this case, Gilmore G. Scranton?

Ans. Yes, sir.

Intr. 7. Did you know him during the progress of this work?

Ans. Yes, sir.

Intr. 8. Did he reside at Sault Ste. Marie?

Ans. Yes, sir; he was a minor at that time and I met him with his father.

24 Intr. 9. Did you ever notice any perceptible difference in the depth of the water before and after the building of this pier?

Ans. I never noticed any difference; in fact, I know nothing about it.

Intr. 10. What is the depth of the water at the west end of the new South pier?

Ans. It was about sixteen feet.

Intr. 11. And gradually diminished from there to the shore?

Ans. Diminished quite rapidly in going from the pier to the shore, or it diminished quite rapidly for a short distance. In going from the pier to the shore it diminished in any direction.

Intr. 12. How deep from the shore line was the water that is

marked "Whelpley, 1854 and 1855," from riparian boundary? State whether it deepens there very abruptly or gradually for some distance.

Ans. It was somewhere from three to five feet from where the boundary intercepts.

Intr. 13. Before the building of this pier, this new South pier, how near to the shore line just referred to could boats of any size approach? Could all boats drawing six, seven or eight feet of water get near to your pier where you had constructed up to the line marked "riparian boundary"?

Ans. A boat of that draft could not have reached the South pier.

Intr. 14. In what manner, if at all, did the building of this pier interfere with or obstruct access to the shore line marked "Whelpley 1854," or the private claim, the claim of Mr. Scranton, interfere in any way with navigation?

Ans. Navigation at that time was carried on with vessels exceeding six feet of draft, and in that case it would not be apt to get even with the line of the pier.

Redirect examination.

By J. C. DONNELLY, counsel for plaintiff:

Intr. 1. How far does it interfere with the 12-foot line, and going from the 12-foot line to the upland shore?

Ans. The pier closes communication by vessels.

Intr. 2. Doesn't it also prevent the construction of docks and the use of the water front and the channel bank and the deep-water line? I mean the original deep-water line.

Ans. A dock or pier built in that locality would be an obstruction to the canal, and it could not exist.

Intr. 3. So that the Government, after you finished the construction of the South pier and the entire improvements in that neighborhood, in cutting the dredging from the South pier out to the twelve-foot or sixteen-foot land, so called, was in actual possession of the entire front, or riparian front, and was using it for that pier and the canal?

Counsel for defendant objects to the question upon the ground that it is incompetent.

Ans. The area described was in constant use by vessels entering and leaving the canal.

Intr. 4. Could it have been used for that purpose unless the Government had taken possession?

Counsel for defendant objects to the question upon the ground that it is incompetent and irrelevant and immaterial.

Ans. No, it could not.

Intr. 5. So that, Mr. Noble, this improvement, including the construction of the South pier and the dredging out to the depth necessary and to conform with the depth in the canal, is in substance and

fact an artificial channel by the Government under your supervision?

26 Ans. Yes, sir.

Intr. 6. That is so between the South pier and the 12-foot land to which we have called attention, is it not?

Ans. Yes, sir, assuming the map to be correct.

Intr. 7. Without regard to the map at all, simply from your knowledge of the work, that channel is substantially an artificial one?

Ans. Yes, sir, within the limit described.

Intr. 8. If a man owned private claim 3 and desired to build a dock or wharf, as he claimed he had a right under the law, at the channel bank, or at the deep-water line, or navigable water line, so called, assuming twelve feet in the present case to be the channel bank, how could he do it after you had put in that pier and made that dredging, without planting it in the middle of that artificial channel which you have constructed?

Objected to by counsel for defendant on the ground that it is incompetent and immaterial.

Ans. It wouldn't be possible to do it without being in the artificial channel.

Intr. 9. The result of that is that if the owner of lot 3 is deprived from any cause of the use of the riparian front, isn't the effect of it, or the whole construction, to deprive him entirely of his water front?

Objected to by counsel for defendant because it is incompetent and immaterial.

Ans. So far as I can see that is a legal question rather than a fact.

Intr. 10. Referring to the question of Gen. Weitzel's authority, you were called upon from time to time to make reports of your work?

Ans. Yes, sir.

Intr. 11. In what form were those reports made?

Ans. In writing.

27 Intr. 12. They were written reports and submitted to Gen. Weitzel as the officer in charge?

Ans. Yes, sir.

Intr. 13. How frequently were you required to make those reports?

Ans. There was an annual report, which described briefly the progress of the work during the year.

Intr. 14. To whom were they made?

Ans. To Gen. Weitzel.

Intr. 15. Are you familiar with the ultimate destination of those reports?

Objected to by counsel for defendant as incompetent and irrelevant.

Ans. The reports were in substance a part in Gen. Weitzel's records as Chief Engineer of the United States Army.

Intr. 16. Who was Chief Engineer of the United States Army at that time?

Ans. I do not now remember, but I think it was Gen. Humphreys.

Intr. 17. Did the Chief Engineer of the United States Army publish an annual report of the work done under that department?

Ans. They were published by the Government.

Intr. 18. From an examination of the volumes of some of the reports do you find that any of your reports are embodied in them?

Ans. Yes, sir.

Intr. 19. What volumes have you before you?

Ans. Report for year ending June 30th, 1870, and report for year ending June 30th, 1878, and report for year ending June 30th, 1880.

Intr. 20. In those volumes do you find some of your reports?

Ans. Yes, sir.

28 Intr. 21. Designate the pages, and state whether there are any maps and charts accompanying your reports, and whether you recognize them as maps and charts attached to your reports.

Ans. On pages 922, 923, 924 of the reports for 1870, and the pages following 924, and on page 1219, a report for 1878, and the pages preceding that page, and on pages 2070 and 2071 of the report for 1880, and page 2068.

Intr. 22. Is it not a fact, Mr. Noble, that it was well understood by Gen. Weitzel and other officers connected with the improvement that in the construction of that South pier there was a serious question?

Objected to on the ground that it is incompetent and irrelevant.

Ans. I am not certain that the matter was ever brought before Gen. Weitzel.

Intr. 23. Was there any question made or brought before any one else?

Ans. I remember nothing about it, except that once Mr. Scranton mentioned it to me.

Intr. 24. In connection with the extension of the South pier, did you refer at all to the original map or plat, fixing the right of way to the canal, as was filed in the War Department?

Objected to by counsel for defendant as incompetent and irrelevant.

Ans. Not to my knowledge.

Intr. 25. Who was the contractor for the dredging?

Ans. C. S. Barker.

Intr. 26. Who paid it?

Objected to by counsel for defendant as incompetent, irrelevant, and immaterial.

Ans. I have no personal knowledge of the payments.

Intr. 27. You didn't do the disbursing?

Ans. No, sir.

29 Intr. 28. Did Barker do the work under contract?

Ans. Yes, sir.

Intr. 29. Did that include the dredging for the construction of the pier?

Objected to by counsel for defendant as incompetent and irrelevant, as the witness does not pretend to know the nature of the contract, and it is objected to because the contract is not shown to be in evidence, it being in writing is therefore the best evidence of what it contains.

Intr. 30. With whom did he have the contract?

Ans. I don't recollect the exact form of the contract. It was for the United States.

Int. 31. How did you, or from whom did you draw your pay?

Objected to by counsel for defendant as immaterial.

Ans. From Gen. Weitzel.

Intr. 32. Was Gen. Weitzel disbursing officer?

Ans. Yes, sir.

Intr. 33. Were you paid by draft on the Treasury?

Ans. I was paid by a check on the Second national bank.

Further sayeth not.

A map designated "Upper end Saint Mary's Falls canal and part of private claim 3, in section 1, T. 47 N., R. 1 W., Michigan, 1891 and 1892," is offered in evidence by counsel for plaintiff, and the counsel for defendant objects to the map being offered in evidence because the map is not offered and is not the original survey, and it is incompetent for that reason.

(Signed) ALFRED NOBLE.

Subscribed and sworn to before me, at Memphis, Tennessee, on this 14th day of April, A. D. 1892, by the said Alfred Noble, as stated in the caption hereof, and after the said witness

30 had read over the same. By agreement of counsel named in the caption hereof, no further certificate is made to this deposition.

JOHN B. CLOUGH,
Commissioner, etc.

The map above mentioned, called the J. B. Davis map, 1891-'92, is hereto attached, and is marked Exhibit No. "10."

Plaintiff then offered in evidence Exhibits "7" and "8," being certified copies of lake survey maps, hereto attached and made a part of this bill of exceptions.

Plaintiff further offered in evidence:

Exhibit "1," tracing Carlton map, entrance to canal.

Exhibit "2," blue print Jeff. Davis map of canal.

Exhibit "4," tracing *and* large scale showing P. C. 3 and old canal entrance.

Exhibit "5," tracing in large scale, showing P. C. 3 and new canal entrance.
Exhibit "7," lake survey chart of 1857.
Exhibit "8," lake survey chart down to September, 1891.
Exhibit "9," blue print of Whelpley survey.
Exhibit "A," blue print Gen. Weitzel's map, 1878.

JOSEPH RIPLEY, a witness produced and sworn on behalf of defendant, testified that he was employed by the United States as an assistant civil engineer on the St. Mary river and ship canal improvement; that he knew the defendant Wheeler since 1882, and that the defendant was general superintendent of the canal and said improvements, and the operating and care of the St. Mary's Falls ship canal; that as such superintendent he was the custodian of the Government property and land belonging to the canal, and held it for the United States; that defendant resided a portion of the time from 1882 at Detroit, and the remainder of the time at Sault Ste. Marie; that he has at no time since 1890 resided on the canal property, and that he has never lived upon the
31 premises described as private land claim No. 3 of Whelpley's survey in the village of Sault Ste. Marie or occupied any building upon it; that said defendant Wheeler never had, to witness' knowledge, any control or management or claimed any of the aforesaid described premises.

Cross-examination:

Witness testified that he knew where the South pier was, and that in drawing a line at right angles to the course of the stream, making the lateral lines of the lot, the South pier extends across the front of private land claim three; that work had been done on that pier under defendant Wheeler's supervision right along since 1891; that the character of the work was refilling the superstructure of the pier, setting out a row of trees and building a stone wall on the back of the pier. Witness testified further that this was in a way permanent work on the riparian front; that it had remained there ever since, and that defendant Wheeler was still in control of it as custodian, and in charge of the work and maintaining it. Witness testified further that there was no dredging done between the pier and dry land; that the work done previous to defendant Wheeler being in charge was a stone filling, and that the work defendant Wheeler had done was for the preservation and to make the pier more lasting and permanent; that it was very shoal water between pier and dry land, and especially in front of private land claim 3; that, as witness understood it, the pier in question was a part of the canal, and that the offices of defendant Wheeler were within the canal grounds in the vicinity of the locks and on a different private land claim.

32 Redirect examination:

The office was a little over 4,000 feet from private land claim 3; that of these several offices occupied since 1890, the closest one was

4,000 feet from private land claim 3; the work there was done by Mr. Wheeler in his capacity as superintendent of the canal and his immediate superiors were Col. Farquar, Gen. O. W. Poe and Col. Lydecker, all engineer officers in the service of the United States. They were assigned to this work by the Chief of Engineers United States Army. The pier was extended and work was done under the immediate supervision of Alfred Noble; it was started in 1877 and finished in 1881. Mr. Wheeler succeeded Alfred Noble in 1882. He had nothing personally to do with the making or original construction of the extension of the pier which brought it along in front of private land claim three. Work has been done every year in repairing and improving this pier under the immediate superintendence of defendant Wheeler, who was under the three engineer officers mentioned, who had general control of the river improvements.

Both parties then rested.

Thereupon counsel for plaintiff requested the court to charge the jury as follows:

Under the law of this State, applicable to the facts in this case, the plaintiff is the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of his upland to the center file of the stream, and running at right angles with the course of the stream in front of the upland, and I therefore charge you that the land and property described in plaintiff's declaration belongs to and is owned by the plaintiff in fee-simple, as claimed by him, and so belonged to him when this action was brought.

33 That the pier or structure in question, as shown by the testimony, was constructed and is now maintained by the defendant across plaintiff's land without his consent and against his rights in the premises.

That neither the defendant nor the United States had any lawful right to construct said pier on and across the premises in question, this taking possession of the premises adversely to the plaintiff and excluding the plaintiff from enjoyment thereof, and from all access from his said land and premises to the navigable water of the river in front thereof, and from the navigable water of the said river to his said land.

That neither the Government of the United States nor the defendant had any lawful right to so construct said pier or to maintain the same, as was being done at the time this suit was brought, and as they are now doing, without their first having acquired the right to so construct and maintain the same from the owner of the fee, or of having obtained the right therefor by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor.

That under article V of amendments to the Constitution of the United States, the property of the plaintiff, the property in question, being the private property of the plaintiff, could not lawfully be taken for the public use to which it was appropriated without just

compensation having been made therefor to the owner or without due process of law.

And the jury are instructed that the construction of this pier was in violation, and the maintaining of the same was in violation of said article V of the amendments to the Constitution of the United States in this, that it appears from the testimony in the case that the same was appropriated without due process of law, and the
34 same was taken and devoted to a public use without the consent of the owner thereof, and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article V; and that the taking possession of the land of the plaintiff and the construction of the pier thereon, in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable water, the natural navigable water of the stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said article V of amendments to the Constitution of the United States, and as depriving the owner thereof of his property without due process of law, and without just compensation, and without his consent.

Which said requests on the part of the said plaintiff, the said court there refused to give, and to which refusal the said counsel for said plaintiff then and there duly excepted. And thereupon the said court charged the jury as follows:

Charge to the Jury.

GENTLEMEN OF THE JURY: This is an action in ejectment, commenced in this court in 1891, to recover "an undivided one-half interest in private land claim number three, of Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the St. Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof."

The material facts are not in dispute.

35 It is conceded that this action must be disposed of by the court on matters of law, and the jury directed what verdict to render.

Private claim 3 lies at the west or upper end of the St. Mary's Falls ship canal at Sault Ste. Marie, Michigan, and was patented to Samuel Peck and the heirs of Franklin Newcomb, the plaintiff's original grantors, in 1874, under an act of Congress passed in 1850, providing for the examination and settlement of claims for land at Sault Ste. Marie, in Michigan. It was surveyed under that act by Deputy United States Surveyor Whelpley, was described by metes and bounds, one line of which was "along the right bank of St. Mary's river;" the plat of survey was approved by the surveyor general at Detroit, Michigan, according to the provisions of said act

in 1855, and this claim was then confirmed to those to whom it was subsequently patented.

Under an act of Congress passed in 1852, a strip of land 400 feet in width was granted to the State of Michigan for the construction of a ship canal around the St. Mary's falls, and in 1853 the present site was platted, selected and thereupon approved by the Hon. Jefferson Davis, then Secretary of War. The canal was begun in 1853 and finished in 1855, being the same year in which the Whelpley map was finally approved. As the location of the canal was originally platted and the canal itself planned and constructed, piers were extended into the water from the west end, curving to the north, the South pier being in front of that portion of private land claim No. 3, now in controversy, but leaving a riparian frontage of about 300 feet open to deep water. The canal was constructed by the side of the rapids in dry land, excepting the comparatively short piers which extended at either end. The site was reserved from the old Fort Brady military reservation.

36 It was built, owned and operated by the State of Michigan until 1881, when it was transferred to the United States. The Federal Government had been making appropriations and conducting extensive improvements at this point for several years prior to the date the canal was turned over, and as a part of those improvements the west end of the canal had been straightened out, and the South pier, which gives rise to this controversy, had been extended entirely across the frontage of private claim No. 3, excluding any access therefrom to navigable water.

The extension of this pier was begun in 1877 and completed in 1881.

Private claim No. 3 lies on the bay at the head of the St. Mary's falls on the south side. The water in front of it was, in its natural condition, navigable, but shoal for some distance from the shore. The natural navigation of Lake Superior, obstructed by the falls, terminated there.

The new pier was sunk in a dredge cut made from deep water through the shoal to the shore, and the space between the two piers was then dredged out, giving a deep and broad entrance to the canal from the river above.

The entrance to Lake Superior is some eight miles above the canal, and the pier was not required as a shelter from floods or storms. Its manifest purpose was to retain the embankment on the south side of the canal extension, to furnish moorage for vessels, a substantial place from which to check and guide them as they passed in and out of the canal, and probably for the maintenance of lights. It was maintained as a part of the St. Mary's Falls ship canal, and was under the control and direction of its officers.

Mr. Wheeler, the defendant, though personally sued, has no personal interest in the property in dispute. As an officer of
37 the United States Government and superintendent of this canal, he was in possession and control of the said pier at the time of the commencement of this suit.

As far as the testimony discloses, no improvements have ever been made or attempted upon claim 3 by the plaintiff or his grantors. He at one time attempted to use the pier in controversy for unloading a cargo, and was prevented by the defendant Wheeler, who was then in possession of it in his official capacity as superintendent of the canal, and who, as such, denied to the plaintiff the use of the pier and asserted exclusive, and necessarily adverse, possession.

This cause was removed to the Federal courts shortly after its commencement, on the ground that the Government was the real party in interest, and that the defense depended upon the construction of United States laws, but it has finally been remanded to this court for trial.

The United States district attorney has here followed a practice which seems to meet the approval of the Supreme Court of the United States, and intervened to file a suggestion, calling to this court the fact that the property in controversy, the title and possession of which are the subjects of this litigation, is and has been for many years in the possession of the United States, through its officers and agents, held for public uses in connection with the commerce and navigation of the Great Lakes; that the nominal defendant has no personal interest in the matter; that his physical possession of the premises is in his official capacity and in law the possession of the United States; that the United States has always held title to the said land, and now holds possession under its claim of title; that this action is in effect an action against the United States Government, which in its sovereign capacity cannot be sued; and
38 for these reasons asks that all proceedings be stayed and the suit dismissed.

That the defendant holds as agent, under a claim of right and title in the United States, is manifest, but it is contended by counsel for plaintiff that the doctrine that the United States cannot be sued except by authority of Congress has no application here and cannot be invoked where officers and agents of the Government, while in possession of real estate claimed by the Government, are sued in ejectment by one claiming title and right of possession.

Such is the holding of the Supreme Court of the United States in the elaborately discussed case of The United States against Lee, 106 U. S., 196. Since that decision was rendered the principles there announced have been recognized by the subordinate courts as of general application and were followed by the Federal courts before whom this case has heretofore gone.

It is to be observed that the decision referred to was reached with difficulty and sustained by only a bare majority of one, four judges of the Supreme Court, including the Chief Justice, joining in a lengthy and carefully considered dissenting opinion.

Whether an action in ejectment was anything more than a possessory action under the local laws applicable to the case they were deciding, we are unable to state, but the judgment in that case was only for possession.

In the more recent case of Stanley *vs.* Schwalby, 162 U. S., 255,

submitted and decided in 1896, the question was again presented to the Supreme Court by Solicitor General Conrad. The decision then rendered, though not in express terms overruling the Lee case, announces principles worthy of consideration in connection with the case at bar.

39 That was an action brought in the district court of the State of Texas by Mary A. Schwalby and her husband against General Stanley and other army officers to try the title to a parcel of land which formed part of the military reservation of San Antonio, Texas. The plaintiff claimed title in one-third of the disputed tract, and possession of the whole.

The district attorney set up, amongst other things, the defense that the suit was, in effect, against the United States, and could therefore not be maintained. The plaintiff had judgment in the lower courts, and in reversing the case, the Supreme Court says: "The judgments of the courts of the State of Texas appear to have been largely based on United States against Lee, 106 U. S., 196. In that case an action of ejectment was brought in the circuit court of the United States against officers occupying, on behalf of the United States, lands used for a military station and for a national cemetery. The Attorney General filed a suggestion of these facts and insisted the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. This court held that the officers were trespassers and liable to action, and therefore affirmed the judgment below, which, as appeared by the record of that case, was simply a judgment that the plaintiff recover against the individual defendants the possession of the land described and costs, and this court distinctly recognized that if the title of the United States were good it would be a justification of the defendants—that the United States could not be sued direct by original process, as a defendant, except by authority of an express act of Congress."

"In an action of trespass to try title, under the laws of Texas, a judgment for the plaintiff is not restricted to *possession*, but may be (as was in this case) for *title* also. By Tex. Rev. Stat., sec.

40 4784, the method of trying title to lands, tenements or other real property shall be by action of trespass to try title."

"By sec. 4811, the judgment shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all parties claiming from, through or under such party, by title arising after the commencement of such action."

"In the case at bar (Schwalby *vs.* Stanley) the United States, and their agents in their behalf, claimed title in the whole of the land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervenor for another third part of the land. It was thus adjudged that the United States had the title in that part, if not also in the remaining third, to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole, jointly with the

individual defendants, was directly against the United States and against their property, and not merely against their officers."

Applying the principles announced in that decision upon the facts there involved to the case now on trial, we find the plaintiff here claiming title to an undivided one-half of the land in controversy and possession of the whole. The defendant Wheeler is in possession as an officer of the Government, with no personal interest, as were Gen. Stanley and the other army officers in that case. In this case, as in that, the United States, and their officers in their behalf, claim title in the whole of the property in their possession and now in dispute.

In this action under our Michigan laws, as in that action under the Texas laws, a judgment for the plaintiff is not restricted to *possession*, although ejectment is, in Michigan, primarily a pos-
41 sessory action, but may be for *title* also. In truth, under the pleadings and proofs in this case, the judgment must be for title if plaintiff prevails. How. Stat., sec. 7815.

In this State ejectment generally determines the title. The action, as modified by our statutes, amplified and enlarged in its scope, with all fictitious parties, demises, etc., abolished, is the usual method of trying title to lands, tenements or other real property, just as the action of trespass to try titles is in Texas. "Our statute has substantially superseded the old action of ejectment, with its fictions and wearisome forms, and has given, under the same name, a much broader and more potent remedy. As marked out by the legislature, it has the effectiveness of a real action. It is a proceeding to try titles, as well as to determine who has the right of possession. It is made applicable to cases where formerly a writ of right was the appointed remedy, and it is the only action for the determination of titles to land."

45 Mich., p. 90.

The wording, as the nature of the judgment in ejectment found in our statute, is similar to that found in the Texas statute, and is as follows:

"Every judgment in the action of ejectment rendered upon a verdict shall be conclusive as to the title established in such action upon the party against whom the same is rendered, and against all parties claiming, through, from or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained."

A verdict in this case in favor of the plaintiff must necessarily be for his title in fee of an undivided one-half of the premises in controversy, and possession of the whole, jointly with defendant
42 Wheeler, which would be, in effect, a judgment against the United States and its property.

As the facts just suggested seem to me to dispose of the case, I do not deem it essential to review the able arguments presented by counsel as to the respective rights of the plaintiff and the Government in the submerged lands across which the pier which gave rise

to this litigation stands. The jury will render a verdict for the defendant. The clerk will take and record the verdict.

And thereupon the plaintiff excepted to the charge of said court directing a verdict for defendant.

And thereupon the jury rendered a verdict for the defendant and against the plaintiff.

Assignment of Errors.

And now comes the said Gilmore G. Scranton by John C. Donnelly and Harlow P. Davock, his attorneys, and says that in the record and proceeding there is manifest error, to wit:

1. The court erred in refusing to give the plaintiff's request to charge:

That under the law of this State applicable to the facts in this case the plaintiff is the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of his upland to the center file of the stream and running at right angles with the course of the stream in front of the upland, and I therefore charge you that the land and property described in plaintiff's declaration belongs to and is owned by the plaintiff
43 in fee-simple, as claimed by him, and so belonged to him when this action was brought.

That the pier or structure in question, as shown by the testimony, was constructed and is now maintained by the defendant across plaintiff's land without his consent and against his rights in the premises.

That neither the defendant nor the United States had any lawful right to construct said pier on and across the premises in question, this taking possession of the premises adversely to the plaintiff and excluding the plaintiff from enjoyment thereof, and from all access from his said land and premises to the navigable water of the river in front thereof and from the navigable water of the said river to his land.

That neither the Government of the United States nor the defendant had any lawful right to so construct said pier, or to maintain the same, as was being done at the time this suit was brought, and as they are now doing, without their first having acquired the right to so construct and maintain the same from the owner of the fee, or of having obtained the right therefore by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor.

That under article V of amendments to the Constitution of the United States, the property of the plaintiff, the property in question, being the private property of the plaintiff, could not be lawfully taken for the public use, to which it was appropriated without just compensation having been made therefore to the owner or without due process of law.

And the jury are instructed that the construction of this pier was in violation, and the maintaining of the same was in violation, of said article V of the amendments to the Constitution of the United

States in this, that it appears from the testimony in the case
44 that the same was appropriated without due process of law, and the same was taken and devoted to a public use without the consent of the owner thereof and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article V; and that the taking possession of the land of the plaintiff and the construction of the pier thereon, in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable water, the natural navigable water of the stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said article V of amendments to the Constitution of the United States, and as depriving the owner thereof of his property without due process of law, and without just compensation, and without his consent.

2. In directing the jury to render a verdict in favor of the defendant and against the plaintiff.

And because none of the exceptions so taken and made to the decisions and opinions of the circuit judge do appear upon the record of said trial, therefore, on the prayer of the said plaintiff, by his counsel, the circuit judge hath signed this bill of exceptions, which contains a substantial statement of all the evidence introduced on the trial of said cause, according to the statute in such case made and provided, this day, February 10, 1897.

JOSEPH H. STEERE,
Circuit Judge.

45 EXHIBIT "3"—DEED.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, under the provisions of the act of Congress, approved the 26th day of September, 1850, entitled "An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan," the claim of Samuel Peck and heirs of Franklin Newcomb has been confirmed to a tract or parcel of land designated on the connected plat of survey, approved under date of September 4th, 1855, by the surveyor general at Detroit, made pursuant to the act aforesaid as lot number three, containing nineteen acres and forty-five one-hundredths of an acre, in section one, in township forty-seven north of range one west, and in section six, in township forty-seven north of range one east, in the district of lands subject to sale at Marquette, formerly Sault Ste. Marie, in the State of Michigan; and, whereas, there has been deposited in the General Land Office of the United States a certificate No. 111, of the register and receiver at Marquette, Michigan, whereby it appears that payment has been made in full, according to law, of the amount of assessment on said claims.

Now know ye: that the United States of America, in consideration of the premises and in conformity to the provisions of the act

of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said Samuel Peck, and heirs of Franklin Newcomb, and to their heirs, the tract or parcel of land above described; to have and to hold the same, together
46 with all the rights, privileges and immunities and appurtenances of whatever nature thereunto belonging unto the said Samuel Peck and heirs of Franklin Newcomb and to their heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

[SEAL.]

Given under my hand, at the city of Washington, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

By the President:

U. S. GRANT,
By S. D. WILLIAMS, *Secretary.*

L. K. LIPPINCOTT,
Recorder of the General Land Office.

Recorded vol. 1, page 164.

STATE OF MICHIGAN, }
Register's Office, Chippewa County. }

This is to certify that I have compared the annexed copy of deed recorded in Liber 5 of Deeds, on page 217, with the original now remaining of record in this office, and that the same is a true and correct copy of such original, and all of such original.

In testimony whereof I have hereunto set my hand and seal this 29th day of August, 1891.

[SEAL.] LOUIS P. TREMP,
Register of Deeds.

(Endorsed on back:)
United States to Peck & Newcomb. Certificate No. 111.

47 REGISTER'S OFFICE,
Chippewa Co., Mich.

Received for record the 18th day of December, A. D. 1874, at 9 o'clock a. m., and recorded in Liber 5 of Deeds, on page 217.

GUY H. CARLETON, *Register.*

EXHIBIT 6—FIELD-NOTES.

STATE OF MICHIGAN:

State Land Office Official Certificate.

LANSING, *Aug. 26th*, 1891.

I, Geo. T. Shaffer, commissioner of the State land office, do hereby certify that the annexed is a true copy of the field-notes of private

claim No. 3, village of Sault Ste. Marie, surveyed by Thomas Whelpley.

That I have carefully compared the said copy with the original thereof now on file and of record in my office, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed. Done at the city of Lansing on the day and year above written.

[SEAL.] GEO. T. SHAFFER,
Commissioner of the State Land Office.

Town 47 north, range one west, Mich.

LAND OFFICE, *August 26th*, 1891.

Field-notes of United States Survey of Private Claim Number 3, Sault Ste. Marie, by Thomas Whelpley.

Claim number 3, Samuel Peck and Franklin Newcomb.

48 First part claim number 3 began at post number 1–3 cedar, 2 feet 9 inches long, 3½ inches by 2¾ inches, and one foot out of ground, west side Meridian street, 50 links north, 88 degrees 50 minutes west from quarter-section post, east side section 1, town 47 north, range 1 west; thence north along west side Meridian street 7 chains 87 links to post numbered 1–4 cedar, 2 feet 5 inches long, 2½ by 2¾ inches, 11 inches out of ground, northeast corner south side of Ridge street; north 88 degrees 50 minutes west along south side of Ridge street 5 chains 25 links, number on post 1–5 cedar, 2 feet 2 inches long, 2½ inches by 2½, 4 feet out of ground, right bank Ste. Marie river, northwest corner; south 36 degrees 43 minutes west along right bank Ste. Marie river 2 chains 36 links to post on river bank; north 65 degrees west along right bank river 2 chains to post on river bank; south 30 degrees east along right bank river 1 chain 50 links to post on river bank; south 22¾ degrees west along right bank river 5 chains 90 links, post numbered 1–2 cedar, 2 feet 7 inches long, 3 inches by 2½ inches, 4 feet out of ground, southwest corner; south 88 degrees 50 minutes east along south boundary 10 chains to post 1–3 cedar, 2 feet 9 inches long, 3½ by 2¾ inches, 1 foot out of ground, to place of beginning, containing 6.42 acres.

Claim number 3, Peck and Newcomb.

Second part claim number 3 began at post number 1–7 cedar, 2 feet 5 inches long, 2¾ inches by 3¼ inches, 6 inches out of ground, north side of Ridge street and west side Meridian street, 50 links north 88 degrees 50 minutes west from a point on the principal meridian of Michigan, 8 chains 87 links north of quarter-section post, east side section 1, town 47 north, range 1 west; thence north along west side Meridian street 4 chains 22 links to post number 1–8 cedar,

49 2 feet 4 inches long, 3¼ by 3½ inches, 5 inches out of ground, northeast corner, south side Canal street; south 85 degrees 23 minutes west along south side Canal street 3

chains 10 links to post number 1–9, white cedar, 2 feet 6 inches long, 2½ inches by 3½ inches, 6 inches out of ground, northwest corner, right bank River Ste. Marie; south 26 degrees 16 minutes west along right bank Ste. Marie, 4 chains 32 links to post number 1–6, white cedar, 2 feet 6 inches long, 2¾ by 3½ inches, 5 inches out of ground, north side of Ridge street, southwest corner; south 88 degrees 50 minutes east along north side Ridge street 5 chains to post number 1–7, white cedar, 2 feet 5 inches long, 2¾ by 3¼ inches, 6 inches out of ground to place of beginning, containing acres 0,09-100.

Claim number 3, Peck and Newcomb.

Third part claim number 3 began at post number 1–3–3, white cedar, 2 feet 3 inches long, 3 by 4 inches, 11 inches out of ground, standing at the intersection of the northerly boundary of the canal reservation and the principal meridian of Michigan, 20 chains and 22 links north from the quarter-section post, east side section 1, township 47 north, range 1 west; thence north along the meridian to right bank River Ste. Marie 90 chains to post numbered 1–3–5, white cedar, 2 feet 7 inches long, 3 inches by 2½ inches, whole spiked on east side of Morning Star house; south 61 degrees 43 minutes west along right bank of River Ste. Marie 2 chains 24 links to post numbered 1–3–4, white cedar, 2 feet 5 inches long, 3 inches by 3½ inches, 2 inches out of ground, southwest corner; north 85 degrees 23 minutes east along northerly boundary Canal reservation 1 chain 98 links to post numbered 1–3–3, white cedar, 2 feet 3 inches long, 3 inches by 4 inches, 11 inches out of ground, to place of beginning, containing acres 0,09-100.

50 Claim number 3, Peck and Newcomb.

Fourth part claim number 3, began at post number 1–3–3, white cedar, 2 feet 3 inches long, 3 inches by 4 inches, 11 inches out of ground, standing at the intersection of the northerly boundary of the canal reservation and the principal meridian of Michigan, 20 chains and 20 links north from the quarter-section post, west side section 6, town 47 north, range 1 east; thence north 85 degrees 23 minutes east, along the northerly boundary canal reservation, 9 chains 17 links to post number 1–3–6, white cedar, 2 feet 6 inches long, 2 inches by 2½ inches, 1 foot 4 inches out of ground, northeast corner; north 89 degrees west along the north boundary of claim number 3, 9 chains 17 links to post number 1–3–5, white cedar, 2 feet 7 inches long, 3 inches by 2½ inches, whole spiked on east side of the Morning Star grocery house, at intersection of meridian and right bank of River Ste. Marie; meridian north terminus; south along the meridian 90 chains to post number 1–3–3, cedar, 2 feet 3 inches by 3 feet 4 inches, 11 inches out of ground, to place of beginning, containing $\frac{41}{100}$ acres.

Claim number 3, Peck and Newcomb.

Fifth part claim number 3 began at post number 2–3, white cedar, 2 feet 5 inches long, 3 by 3¼ inches, 1 foot 1 inch out of ground,

north side Spruce street, link southwest corner and 50; south 88 degrees 50 minutes east of the quarter-section post on the principal meridian of Michigan, west side section 6, township 47 north, range 1 east; thence south 88 degrees 50 minutes east along north side Spruce street 8 chains 64 links to post number 2–4, white
51 cedar 2 feet 6 inches long, 2¼ by 3¼ inches, 1 foot out of ground, southeast corner; north along east side claim 3 to south side Ridge street 7 chains 87 links to post number 2–5, white cedar, 2 feet 7 inches long, 3 inches by 2¼ inches, 1 foot 3 inches out of ground, northeast corner; north 88 degrees 50 minutes west along south side Ridge street to east side Meridian street 8 chains 64 links to post number 2–2, white cedar, 2 feet 6 inches long, 3¼ by 3¼ inches, 9 inches out of ground, northwest corner; south along east side Meridian street 7 chains 87 links to post number 2–3, white cedar, 2 feet 5 inches long, 3 inches by 3¼ inches, 1 foot 1 inch out of ground, to place of beginning, containing 6.80 acres.

Claim number 3, Peck and Newcomb.

Sixth part claim number 3 began at post number 2–1, white cedar, 2 feet 3 inches long, 2½ inches by 2½ inches, 1 foot out of ground, north side Ridge street, southwest corner and 50 links; south 88 degrees 50 minutes east of a point on the principal meridian of Michigan 8 chains 87 links north from the quarter-section post on the meridian, west side section 6, town 47 north, range 1 east; thence south 88 degrees 50 minutes east along north side Ridge street 8 chains and 64 links to a post number 2–6, white cedar, 2 feet 4 inches long 2¾ by 3¼ inches, 1 foot out of ground, southeast corner; north along the east side claim 3 to south side Canal street 5 chains 18 links to post number 2–7, white cedar, 2 feet 4 inches long, 2¼ by 3¼ inches, 9 inches out of ground, northeast corner; north 85 degrees 23 minutes west along southerly side Canal street to east side Meridian street 8 chains 67 links to post number 2–0, white cedar, 2 feet
52 3 inches long, 2½ inches by 2¾ inches, 8 inches out of ground. This post is set 24 links south 85 degrees 23 minutes west from the corner, on the west side of a house standing on the corner; south along the east side of Meridian street 4 chains 30 links to a post number 2–1, white cedar, 2 feet 3 inches long, 2½ by 2½ inches, 1 foot out of ground, to place of beginning, containing acres 4.095. Whole claim containing acres 19.45.

53 *Præcipe for Writ of Error.*

STATE OF MICHIGAN:

In the Supreme Court.

GILMORE G. SCRANTON, Plaintiff and Appellant,
vs.
EBEN S. WHEELER, Defendant and Appellee.

Charles C. Hopkins, clerk supreme court.

SIR: Please issue a writ of error in the above-entitled cause in favor of the plaintiff, directed to the judge of the circuit court for

the county of Chippewa, and returnable December 15, 1896; action of ejectment.

Enclosed find clerk's fee of six dollars.

Yours, etc.,

HARLOW P. DAVOCK,
JOHN C. DONNELLY,
Attorneys for Plaintiff and Appellant.

Dated November 16, 1896.

(Endorsed:) Filed Nov. 17, 1898. Chas. C. Hopkins, clerk.

54 *Writ of Error.*

The People of the State of Michigan to the judge of our circuit court in and for the county of Chippewa, Greeting:

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our said circuit court, before you, between Gilmore G. Scranton, plaintiff, and Eben S. Wheeler, defendant, in a plea of ejectment, manifest error hath intervened, to the great damage of the said plaintiff, as by his complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you that if judgment be thereupon given, then you send to our supreme court, distinctly and openly, under your seal, the record and proceedings of the plaint aforesaid, together with all things concerning the same and this writ, so that our said court may have them at the supreme court room, in the capitol, in the city of Lansing, on the fifteenth day of December next, that, the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of Michigan ought to be done.

Seal Supreme Court of Michigan.

Witness the Honorable Charles D. Long, chief justice of our supreme court, at Lansing, this seventeenth day of November, in the year of our Lord one thousand eight hundred and ninety-six.

CHAS. C. HOPKINS,
Clerk of the Supreme Court.

To the supreme court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

February 18, 1897.

[Seal Circuit Court, Chippewa Co.]

WILLIAM M. SNELL,
Clerk of the Circuit Court for the County of —.

Endorsed: Filed Feb. 26, 1897. Chas. C. Hopkins, clerk supreme court.

55 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the ninth day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

GILMORE G. SCRANTON, Plaintiff and Appellant,
vs.
EBEN S. WHEELER, Defendant.

This cause, coming on to be heard, is argued by Messrs. Davock and Donnelly, for plaintiff, and by Mr. Power, for defendant, and submitted.

56 *Opinion.*

Supreme Court of Michigan.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER.

This case originated in the circuit court of the county of Chippewa in May, 1891, to recover possession of the following-described parcel of land: "An undivided one-half interest or portion of, in, and to private land claim number 3, Whelply's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof, which said premises the plaintiff claims in fee." The defendant was then the superintendent of the Ste. Marie's Falls canal, under the authority of the United States Government. After issue was joined a petition was filed by the defendant for the removal of the cause to the Federal court, for the reasons (1) that defendant was in possession for the United States, as superintendent of the canal, and that the United States was the real party in interest; (2) that the suit arose under the laws of the United States. Thereupon the suit was removed, and was tried in the circuit court of the United States for the western district of Michigan, September 14, 1892, resulting in a judgment for the defendant. The case was then removed by a writ of error to the United States court of appeals, and there affirmed. 6 C. C. A., 585; 57 Fed., 803. It was then appealed to the Supreme Court of the United States, and dismissed from that court, and remanded to the State court for trial, for the reason that the pleadings did not show any Federal jurisdiction. Thereupon trial was had in the State court, resulting in a judgment for the defendant, and the case is now in this court on a writ of error. The learned circuit judge directed a verdict for the defendant upon the ground that the judgment against the defendant, Wheeler,

would in effect be a judgment against the United States and their property. In this the court was in error. When one in the actual possession of property defends his right of possession upon the ground that the government, State or national, has placed him in possession, he must show that the right of the government is paramount to the right of the plaintiff, or judgment will go against him. This point has been settled by the decision of the Supreme Court of the United States rendered May 10, 1897. Tindal *v.* Wesley, 17 Sup. Ct., 770. In that case the authorities upon this point are reviewed at length, including the case of Stanley *v.* Schwalby, 162 U. S., 255; 16 Sup. Ct., 754, upon which defendant mainly relies.

2. The United States Government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them. That the improvements made were necessary to aid and protect this navigation is established beyond dispute. Had the Government the right to make these improvements upon the submerged land without compensation to the adjoining owner? It is conceded that under the law of Michigan the title to sub-
57 merged land is in the adjoining owner to the thread of the stream. It is insisted in behalf of the plaintiff that the Government possess no right to so use his land, although submerged, and although necessary to so use it in aid of navigation, as to cut off his access to the open water. It is contended on the other hand that this title to submerged lands along navigable waters, and the right of access thereto, are subject to the paramount right of the United States to use this land in such manner as they shall determine to be necessary in aid of navigation. The court of appeals was unanimous in its opinion against the plaintiff's claim. In a very able opinion delivered by Judge Lurton the facts are clearly stated, the authorities cited, and we think the conclusion there reached is the correct one. We therefore deem it unnecessary for us to enter into a long discussion of the law and the authorities. The case of Hawkins' Point lighthouse, 39 Fed., 77, appears to be exactly in point, and to rule the present case. We think the conclusion reached by the court below was a correct one, although it gave a wrong reason. The judgment is affirmed.

C. B. GRANT.
R. M. MONTGOMERY.
J. B. MOORE.
FRANK A. HOOKER.
CHAS. D. LONG.

Endorsed: Filed July 13, 1897. Chas. C. Hopkins, clerk supreme court.

58 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the thirteenth day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius

B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

GILMORE G. SCRANTON, Plaintiff and Appellant,
vs.
EBEN S. WHEELER, Defendant.

The record and proceedings in this cause having been removed to this court by writ of error issued to the circuit court for the county of Chippewa, and the same and the matters in error assigned having been seen and inspected and duly considered by the court, and it appearing to this court that in said record and proceedings and in the giving of judgment in said circuit court there is no error, therefore it is ordered and adjudged that the judgment of said circuit court for the county of Chippewa be, and the same is hereby, in all things affirmed, and that the defendant do recover of the plaintiff his costs, to be taxed, and that he have execution therefor.

59 *Petition.*

To the Honorable Claudius B. Grant, chief justice of the supreme court of the State of Michigan:

The petition of Gilmore G. Scranton respectfully represents:

1. That he is a plaintiff in a cause commenced in the circuit court for the county of Chippewa, in this State, against Eben S. Wheeler, defendant in an action of ejectment, which said cause proceeded to final judgment in said circuit court in favor of said defendant, and was thereupon afterwards removed to the supreme court of this State by writ of error sued out by your petitioner, said supreme court of the State of Michigan being the final court of appeal and review in this State.

2. That the right claimed by said plaintiff was the recovery of the possession of certain land owned by him, from the possession of which he was ousted by the defendant, said ouster consisting of the taking and holding possession by the said defendant of certain of the submerged lands belonging to the plaintiff in the St. Mary's river in said county of Chippewa, said defendant claiming to be in the possession thereof as the agent of the United States, and that they were taken possession of for the purpose of extending the canal around the rapids in the St. Mary's river, and for the improvement of the navigation thereof, and said defendant claiming that the United States had the right and authority to take possession of said lands of said plaintiff without giving him any compensation therefor, and the said plaintiff claiming that the act of the said defendant and of the said United States was in contravention of the provision of the Federal Constitution prohibiting the taking of any private property for public use without due compensation.

60 3. That said cause was duly heard in said supreme court on said writ of error, and the decision and judgment of said circuit court for the county of Chippewa was affirmed.

Therefore your petition prays that you endorse hereon, or on the writ of error hereto attached, an order allowing the issuing of a writ of error to remove the record of said cause to the Supreme Court of the United States for review, in accordance with the provisions of the revised Constitution of the United States, and that a citation may issue over your signature, directed to said defendant as required by rule, and that the bond herewith tendered may be duly approved; and your petitioner will ever pray.

GILMORE G. SCRANTON,
By JOHN C. DONNELLY,
One of His Attorneys.

JOHN C. DONNELLY &
HARLOW P. DAVOCK,
Attorneys for Petitioner.

61 Know all men by these presents that we, Gilmore G. Scranton, of the city of Sault Ste. Marie, Michigan, as principal, and Elmer S. B. Sutton and Victor E. Metzger, of the same place, as sureties, are held and firmly bound unto Eben S. Wheeler, of same place, in the full and just sum of five hundred dollars, to be paid to the said Eben S. Wheeler, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a supreme court of the State of Michigan, in a suit depending in said court between Gilmore G. Scranton, plaintiff, and Eben S. Wheeler, defendant, a judgment was rendered against the said Gilmore G. Scranton, and the said Gilmore G. Scranton having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Eben S. Wheeler, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Gilmore G. Scranton shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GILMORE G. SCRANTON. [SEAL.]
ELMER S. B. SUTTON. [SEAL.]
VICTOR E. METZGER. [SEAL.]

Sealed and delivered in presence of—
WILFRED T. RAINS.
L. H. AUSTIN.

62 WESTERN DISTRICT OF MICHIGAN, *ss:*

Personally appeared before me Elmer S. B. Sutton and Victor E. Metzger, in said district, and each made oath that each is worth the

sum of one thousand dollars after payment of his just debts in real estate subject to execution within said district.

ELMER S. B. SUTTON.
VICTOR E. METZGER.

Subscribed and sworn to before me this 2nd day of February, 1898.

[SEAL.] JNO. A. COLWELL,
U. S. Commissioner.

Approved by—
C. B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

(Endorsed:) Filed Feb. 21, 1898. Chas. C. Hopkins, clerk supreme court.

63 Supreme Court of the United States.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error. } Assignment of Errors.

And now comes the said plaintiff in error and says that the supreme court of the State of Michigan was in error in its judgment in said cause as follows, to wit:

1. The said supreme court erred in affirming the judgment of the circuit court for the county of Chippewa in said cause in favor of defendant in error and against plaintiff in error.

2. Said supreme court of the State of Michigan erred in holding and deciding — said cause that the plaintiff in error was not entitled to recover against the said defendant in error the possession of the lands in controversy in said cause.

3. The said supreme court erred in its judgment in said cause in holding and deciding that the defendant in error was lawfully in possession of the lands in controversy under and by virtue of the power of the Federal Government to improve the navigability of public streams and rivers, and that the United States Government, in the exercise of that power, had the lawful right to take possession of the submerged lands of the said plaintiff in error without making him any compensation therefor, and to keep and use the same for the improvement of the navigability of the St. Mary's river and the extension of the canal around the falls of St. Mary without giving the said plaintiff in error due compensation therefor.

64 4. Said supreme court of the State of Michigan erred in holding and deciding that the plaintiff in error was not entitled as against the defendant in error to the protection of the provision of the Federal Constitution, to wit, article 5 of the amendments to the Constitution of the United States, which prohibits the taking of private property for public use without just compensation.

5. The said supreme court of the State of Michigan erred in affirming and approving the action of the circuit court for the county of Chippewa in refusing to charge the jury, as requested by the said plaintiff in error, as follows:

"That under the law of this State applicable to the facts in this case the plaintiff is the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of his upland to the center file of the stream and running at right angles with the course of the stream in front of the upland, and I therefore charge you that the land and property described in plaintiff's declaration belongs to and is owned by the plaintiff in fee-simple as claimed by him and so belonged to him when this action was brought.

That the pier or structure in question as shown by the testimony was constructed and is now maintained by the defendant across the plaintiff's land without his consent and against his rights in the premises.

That neither the defendant nor the United States had any lawful right to construct said pier on and across the premises in question, thus taking possession of the premises adversely to the plaintiff and excluding the plaintiff from enjoyment thereof and from all access from his said land and premises to the navigable water of the river in front thereof and from the navigable water of the said
65 river to his land.

That neither the Government of the United States nor the defendant had any lawful right to so construct said pier or to maintain the same as was being done at the time this suit was brought and as they are now doing without their first having acquired the right to so construct and maintain the same from the owner of the fee or of having obtained the right therefor by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor.

That under article V of amendments to the Constitution of the United States the property of the plaintiff, the property in question being the private property of the plaintiff, could not be lawfully taken for the public use to which it was appropriated without just compensation having been made therefor to the owner or without due process of law.

And the jury are instructed that the construction of this pier was in violation of said article V of the amendments to the Constitution of the United States in this, that it appears from the testimony in the case that the same was appropriated without due process of law, and the same was taken and devoted to a public use without the consent of the owner thereof and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article V, and that the taking possession of the land of the plaintiff and the construction of the pier thereon in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable stream, and to prevent him using his said

property by passing over or across said pier, as shown in the
66 testimony of the case, was in violation of said article V of amendments to the Constitution of the United States and as depriving the owner thereof of his property without due process of law and without just compensation and without his consent."

6. Said supreme court of the State of Michigan erred in affirming and approving the action of the circuit court for the county of Chippewa in refusing to direct a verdict in favor of plaintiff in error and in directing a verdict in favor of defendant in error. Therefore he prays that the judgment of the supreme court of the State of Michigan may be reversed, and that said court be directed to reverse the judgment of the circuit court for the county of Chippewa in accordance with the rights of the parties.

JOHN C. DONNELLY &
HARLOW P. DAVOCK,
Attorneys for Plaintiff in Error.

Filed Feb. 18, 1898.

CHAS. C. HOPKINS,
Clerk Supreme Court of Michigan.

67 In the Supreme Court.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER.

On this cause, on reading the petition of the said Gilmore G. Scranton, praying that a writ of error may be allowed to issue in the above-entitled cause to remove the same to the Supreme Court of the United States for review, which said petition is accompanied by a satisfactory bond as required by the statute and the rule in such case made and provided, and also by an assignment of errors, it is ordered that a writ of error in accordance with the prayer of said petition be, and the same is hereby, allowed.

C. B. GRANT,
Chief Justice of the Supreme Court of Michigan.

68 UNITED STATES OF AMERICA, *ss:*

To Eben S. Wheeler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein Gilmore G. Scranton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Claudius B. Grant, chief justice of the supreme court of the State of Michigan, this eighteenth day of

February, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Supreme Court of Michigan, Lansing.]

C. B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

[Endorsed:] Original. 15918. Filed March 9, 1898. Chas. C. Hopkins, clerk.

I hereby accept service of a true copy of the within citation. Feb'y 26, 1898.

L. G. PALMER,
Att'y for Def'd't.

69 UNITED STATES OF AMERICA, *ss:*

To Eben S. Wheeler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein Gilmore G. Scranton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Claudius B. Grant, chief justice of the supreme court of the State of Michigan, this eighteenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Supreme Court of Michigan, Lansing.]

C. B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

[Endorsed:] Original. 15918. Filed March 9, 1898. Chas. C. Hopkins, clerk.

I hereby accept service of a true copy of the within citation. Feb'y 26, 1898.

JOHN POWER,
Att'y for Def't.

70 STATE OF MICHIGAN:

Supreme Court.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error.

To the supreme court of the State of Michigan:

Your petitioner, Harlow P. Davock, respectfully shows to this court that he is the attorney for Gilmore G. Scranton, the plaintiff in the above-entitled cause.

Your petitioner further shows that a judgment has been rendered in this court affirming the judgment of the court below in favor of the defendant in this cause.

Your petitioner further shows that upon application to the Supreme Court of the United States a writ of error and citation has been issued out of the Supreme Court of the United States in the above-entitled cause, and the same is returnable thirty days after the 18th day of February, A. D. 1898.

Your petitioner further shows that it is necessary that certain original papers should be inspected in the Supreme Court of the United States upon such writ of error; that said original papers consist of certain maps included in Exhibits A and one to ten, inclusive, and he prays that the same may be returned with said writ of error, and that this court may make such rule or order for the safekeeping, transportation, and return of such original papers as to them it may seem proper and meet.

And your petitioner will ever pray.

HARLOW P. DAVOCK.

STATE OF MICHIGAN, } ss:
County of Wayne, }

On this 25th day of February, A. D. 1898, before me personally came the above-named Harlow P. Davock and made oath that he has read the foregoing petition by him subscribed and
71 knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those he believes it to be true.

RICHARD G. KIRCHNER,
Notary Public, Wayne County, Michigan.

Endorsed: Filed February 25, 1898. Chas. C. Hopkins, clerk supreme court.

72 STATE OF MICHIGAN:

Supreme Court.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error.

In error to the circuit court for the county of Chippewa.

Suit pending in the supreme court for the State of Michigan, at Lansing, on the 18th day of February, A. D. 1898.

In this cause, on reading the petition of Harlow P. Davock, attorney for the plaintiff in error in said cause, praying that certain exhibits may be returned to the Supreme Court of the United States, together with the writ of error issued out of said supreme court in said cause, it is ordered that the certain original maps used in said cause, to wit:

Exhibit 1, tracing Carlton map, entrance to canal;
Exhibit 2, blue print, Jeff. Davis map of canal;
Exhibit 4, tracing and large scale showing P. C. 3 and old canal entrance;
Exhibit 5, tracing in large scale showing P. C. 3 and new canal entrance;
Exhibit 7, lake survey chart of 1857;
Exhibit 8, lake survey chart down to September, 1891;
Exhibit 9, blue print of Whelpley survey;
Exhibit 10, blue print of J. B. Davis map;
Exhibit A, blue print of Gen. Weitzel's map, 1876;
be transported and returned, together with the writ of error in said cause, to the Supreme Court of the United States, and after the determination of said cause be returned to the circuit court for the county of Chippewa, that being the court in which said exhibits were originally introduced.

C. B. GRANT, *Chief Justice.*

73	Gilmore G. Scranton, plaintiff and appellant, *vs.* Eben S. Wheeler, defendant.	Harlow P. Davock. John C. Donnelly. Error to Chippewa.	Lewis G. Palmer. John Power. Steere, J.

Journal.	Date.	Proceedings.
	1896.	
	Nov. 17	Precipe filed and writ issued, returnable December 15, 1896.
	" 20	Proof of notice of writ filed.
	1897.	
	Feb. 18	Note of argument filed.
	" 26	Return filed.
	" "	Exhibits filed.
	Mar. 2	Note of argument filed.
O 15	Apr. 9	Argued and submitted.
" 194	Jul- 13	Affirmed with costs.
	1898.	
	Feb. 18	Writ of error allowed and filed.
	" "	Assignment of errors in Supreme Court U. S. filed.
	" 21	Bond filed.
	Mar. 9	Citations with acceptance of service filed.
	Feb. 25	Petition of H. P. Davock as to exhibits filed.
	" "	Order of Grant, C. J., as to exhibits filed.
	Mar. 9	Stipulations as to original exhibits and drawings filed.
	" 12	Return forward to Supreme Court U. S.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the

said State in which a decision could be had in the said suit between Gilmore G. Scranton, plaintiff, and Eben S. Wheeler, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
75 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by—

C. B. GRANT,
Chief Justice Supreme Court of Michigan.

[Endorsed:] Filed Feb. 18, 1898. Chas. C. Hopkins, clerk supreme court.

76 Supreme Court of the State of Michigan.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error.

STATE OF MICHIGAN:

In the Supreme Court, *ss:*

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon; the citations, with acknowledgement of service endorsed thereon; a copy of the bond to the adverse party filed with the writ of error, and the assignment of errors in the Supreme Court of the United States.

Seal of the Supreme Court of Michigan, Lansing.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: Case No. 16,825. Michigan supreme court. Term No., 262. Gilmore G. Scranton, plaintiff in error, *vs.* Eben S. Wheeler. Filed March 16, 1898.